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No. 03-1382

In The Supreme Court Of The United States

STEPHEN J. HUFFMAN, Warden, *Petitioner*,

v.

RICHARD M. FRAZIER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The Petitioner demonstrated in his opening brief that the Sixth Circuit decision here adopted a flawed capital habeas framework that conflicts both with this Court's jurisprudence and with opinions from three other circuits. In particular, the Sixth Circuit reversed the time-honored and well-established presumption of adequate representation this Court set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)—presuming instead that counsel's investigation of mitigation evidence was inadequate, despite a complete lack of record evidence regarding the scope of that investigation. Compounding its disregard for this Court's precedent, the court below also adopted, in conflict with at least three other circuits, what amounts to a per se requirement that counsel prefer a brain damage strategy during mitigation (if one is available) over a residual doubt strategy, even if counsel believes it is imprudent (for instance because it opens the door for the prosecution to present prior criminal conduct). Each of these conflicts, by itself, wreaks havoc on the capital habeas framework, and thus independently justifies certiorari; taken together the need for prompt review is only more apparent.

In his opposition, Respondent dispels neither the existence, nor the significance, of these conflicts. With regard to the first, he argues that the Sixth Circuit did not, in fact, reverse the presumption. Opp. at 5. To be sure, the court below did begin its analysis by citing *Strickland*. But, the panel nonetheless held that counsel's investigation was inadequate, *despite no evidence one way or the other on the scope of the investigation*, a result clearly demonstrating that the court flipped the *Strickland* presumption. Nor does Respondent's suggestion that *Wiggins* somehow ameliorates this conflict, *see id.* at 8, survive close scrutiny. Indeed, if anything, it only demonstrates even more clearly why review is necessary here to provide further guidance on *Wiggins*' scope.

Respondent attempts to avoid the second conflict above by misstating Petitioner's argument. He suggests that the circuit cases Petitioner cited in his opening brief to demonstrate the conflict, *see* Pet. at 21-24, are inapposite because in those cases counsel had undertaken an investigation before deciding to rely on residual doubt. *See* Opp. at 13-14. The point, though, is that the court below here said that it could not even "conceive of [a] rational trial strategy" where counsel would choose residual doubt over brain damage evidence during mitigation. *See* App. A at 21a. That is, while the Tenth and the Eleventh circuits have expressly approved decisions by counsel *not* to present brain damage evidence, *see* Pet. at 21-23, the panel here announced that such a choice is virtually per se irrational (and thus ineffective assistance). Nor does Respondent's reliance on *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000), *see* Opp. at 10, save his argument. While it is true that in that case the Sixth Circuit approved a residual doubt strategy, it did not do so in the face of brain damage evidence. In other words, *Scott* is wholly inapposite to the per se rule at issue here—that in the Sixth Circuit counsel must prefer brain damage evidence over residual doubt. That is the rule the divided panel below announced here, and that is the rule that creates the conflict on which Petitioner relies.

Finally, Respondent's suggestion that review is not warranted because the opinion below "is plainly limited to the specific circumstances presented in this case," *see* Opp. at 1, also fails. Unfortunately, there is nothing in the court's opinion that reflects this limitation. And opinions issued since the petition was filed confirm that the Sixth Circuit does not see it that way. In short, despite Respondent's argument to the contrary, the decision below does in fact represent "a sea change in habeas law," *Id.*, urgently necessitating review, and correction, from this Court.

ARGUMENT IN RESPONSE

I. The Sixth Circuit's Decision, By Reversing The *Strickland* Presumption Of Adequacy, Requires Review By This Court Because It Creates Confusion Concerning The Scope Of *Wiggins*.

The Sixth Circuit's reversal of the presumption of adequacy stems largely from its misunderstanding of this Court's recent decision in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2526 (2003). The court below, and Frazier here, improperly compared this case to *Wiggins*. Yet, *Wiggins* is easily distinguishable in at least three ways.

First and most important, the Court in *Wiggins* knew exactly what Wiggins' counsel did and did not investigate *because his counsel testified on the record as to their investigation*. *See Wiggins*, 123 S.Ct. at 2544-45 (Scalia, J., dissenting) (quoting counsel's testimony). Here, Frazier's counsel never testified *at all*. Thus, in *Wiggins*, the testimony overcame the presumption of adequacy. Here, by contrast, a presumption of *in*adequacy substituted for any evidence at all.[1]

Second, in stark contrast to this case, counsel's strategy in *Wiggins* was borne out of "inattention, not reasoned strategic judgment." *Wiggins*, 123 S.Ct. at 2537.

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[1] In the same vein, Frazier remarkably chides the Warden for not requesting an evidentiary hearing during the course of the lower court proceedings. Opp. at 6. But, Frazier produced no evidence on the extent of trial counsel's investigation. If the Sixth Circuit had followed the presumption of adequate performance, as the district court did, then the Warden would have no need for an evidentiary hearing. Only when the Sixth Circuit made a "sea change," *see id.* at 1, by flipping that presumption, did the Warden raise the prospect of an evidentiary hearing, because only then did he need one.

That is, in *Wiggins*, counsel had actually relied on defendant's social history in mitigation, *see id.* at 2538, but had failed to even prepare a "standard" social history report, clearly a gross error *given the strategy they had selected. Id.* at 2536-37. Here, by contrast, the state appellate court found counsel handled Frazier's case in a "thorough and professional manner. . . during both the guilt and penalty phase of appellant's trial." App. F at 180a. And, counsel's selected strategy, residual doubt, did not require further investigation of brain injury evidence.

Third, both Frazier and the Sixth Circuit failed to recognize that, in *Wiggins*, there was no evidence suggesting "that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless." *Id.* at 2357. Here, however, if counsel investigated—again, we simply cannot know if he did on this record—he no doubt found, as outlined in the Warden's opening petition, a great deal of "counterproductive" rebuttal evidence. *See* Pet. at 26 (listing bad acts that prosecution could have introduced). Thus, this case is less like *Wiggins*, and more like the cases *Wiggins* distinguished, cases such as *Strickland* and *Darden v. Wainwright*, 477 U.S. 168 (1986).

That both Frazier and the Sixth Circuit misapplied *Wiggins* to this case, however, strongly argues for review. Commentators have suggested that *Wiggins* was meant "to signal to lower courts to put more teeth in *Strickland* and tighten courts' notoriously lax monitoring of defense counsel conduct." Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument From Institutional Design*, 104 Colum. L. Rev. 801, 832. "More teeth," however, cannot mean evisceration—the route the court below chose. As this case demonstrates, additional guidance on *Wiggins* is absolutely essential if lower courts are to fortify *Strickland* without destroying it.

II. Frazier Mischaracterizes The Circuit Conflict That This Decision Creates.

A. The Sixth Circuit's Per Se Rule Favoring Brain Injury Over Residual Doubt Conflicts With Two Other Circuits.

In the Warden's opening petition, he noted that review is warranted here, not only because of the new "reverse *Strickland* presumption" that the Sixth Circuit adopted, but also due to yet another split among the circuits. In particular, the court below held that it is per se ineffective assistance for counsel to adopt a penalty phase strategy of residual doubt when a potential brain injury strategy exists. In contrast, both the Tenth and Eleventh Circuits have found the opposite—that residual doubt may be used as a penalty phase defense even in light of brain injury evidence. *See Parker v. Sec'y Dep't of Corrections*, 331 F.3d 764 (11th Cir. 2003); *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003) (en banc). Frazier responds to this argument by mischaracterizing the conflict and making factual distinctions that actually help to demonstrate the severity of the split.

The per se rule reflected in the opinion below is that it is ineffective assistance for counsel to rely on a residual doubt strategy *over a brain injury strategy*. As the court below stated, "We can conceive of no rational trial strategy that would justify the failure of Frazier's counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on the hope that the jury would spare his life due to any 'residual doubt' about his guilt." App. A at 21a. *See also id.* at 26a ("In sum no reason at all has been adduced to justify the failure of Frazier's trial counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on an argument of residual doubt. . . . Nor can we fathom one.").

Frazier responds by arguing that the Sixth Circuit has not created a new "per se rule against the use of residual doubt at mitigation" and relying on *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000), to show that the Sixth Circuit has approved of residual doubt as a mitigation defense. *See* Opp. at 10. That is both wholly correct, and entirely irrelevant. The new per se rule is not that residual doubt can *never* be used in mitigation. Rather, the Sixth Circuit's new rule is that residual doubt cannot be used as a mitigating defense *if brain injury evidence is also present*. In *Scott* there is no indication that such evidence was available, thus that case proves nothing about the rule at issue here.

Once the issue is correctly framed, Frazier's attempt to distinguish the Tenth and Eleventh Circuit opinions also fails. He distinguishes *Parker v. Sec'y Dep't of Corrections*, 331 F.3d 764 (11th Cir. 2003), for instance, as a case where defense counsel "conducted a thorough investigation into alternate mitigation evidence and came to a reasoned conclusion that developing and presenting such alternate evidence would either be ineffective as a mitigation strategy or adverse to the defendant." Opp. at 13. Therefore, according to Frazier, that case is inapposite because here Frazier's counsel did not conduct a thorough investigation (or so Frazier and the court below presume), nor reach a reasoned conclusion. *Id.*

But his response again misses the point. The court here found choosing residual doubt over brain injury "irrational on its face" and thus could "conceive of no rational trial strategy" that would elevate residual doubt over brain injury. Yet, in direct conflict, the Eleventh Circuit found the opposite: that court could, and did, "conceive" of a situation where residual doubt could be used *instead of* brain injury evidence. In the Eleventh Circuit, the door is open to use residual doubt instead of brain injury evidence; in the Sixth Circuit that door has been slammed shut.

Frazier's attempt to distinguish *Bryan v. Mullin*, 335 F.3d 1207 (10th Cir. 2003)(en banc), fails for similar reasons. He again relies on factual distinctions, claiming that in *Bryan*, in contrast to this case, counsel elected to forego the brain injury evidence because of his client's wishes and concerns that such evidence "might do more harm than good during the penalty phase."[2] Opp. at 13-14. But again, the point is that the Tenth Circuit could fathom a factual situation where residual doubt was more reasonable than a brain injury defense—the Sixth Circuit cannot.

Indeed, in emphasizing factual distinctions, Frazier highlights the problem with the decision here. This Court in *Strickland* recognized that different facts may call for different strategies and warned against creating "performance checklists" for assessing counsel's conduct. *See Strickland*, 466 U.S. at 688-89. The Sixth Circuit's new per se rule is nothing more than just such a performance checklist.

B. In Declining To Consider The Impact Of Negative Rebuttal Evidence, The Sixth Circuit Conflicts With The Ninth.

As the petition noted, the court below also refused to consider the impact of negative rebuttal evidence if the door were opened through a brain injury defense, and, in doing so, it conflicted with the Ninth which requires counsel to consider that impact. *See* Pet. at 24-25. Frazier's only response is his assertion that the Sixth Circuit "did consider the impact of such evidence against Frazier." Opp. at 16. Presumably, he bases that on the passage where the court noted the possibility of criminal history as rebuttal evidence,

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[2] In fact, the *Bryan* counsel's key concern was that the jury might perceive an inconsistency—*i.e.*, arguing actual innocence at trial and brain injury at penalty phase. *Bryan*, 335 F.3d at 1220. This could have been counsel's concern in Frazier's case, as well.

but stated that, "[n]o such concerns could have justified the approach in the present case, however, where the jury had already heard considerable evidence about Frazier's rape of Skiba." App. A at 23a.

But under that approach, concerns about prior criminal history could *never* justify the decision not to present brain damage evidence. During the guilt phase, the jury always hears bad facts about the accused concerning the particular crime being prosecuted. The key point is that a brain damage strategy would have allowed additional bad facts regarding other pre-injury bad acts that included murders and molestation. The Sixth Circuit, in contrast to the Ninth, simply ignored this downside in concluding that Frazier had "everything to gain and nothing to lose by introducing evidence of his brain injury at the penalty phase of the case." *Id.* at 25a.

III. The Sixth Circuit's Decision Has Already Created Confusion Within The Circuit.

While the Sixth Circuit's decision might, at first glance, seem a mere outlier, that has not proven to be the case. In fact, the opinion has already begun to wreak havoc within the Circuit and promises to fundamentally alter capital habeas jurisprudence.

While Frazier in his brief suggests that his case is an aberration by citing a trio of post-*Frazier* Sixth Circuit cases that make little reference to *Frazier*, *see* Opp. at 10, he fails to provide a complete picture. Indeed, one of the three of cases Frazier cites, *Smith v. Mitchell*, 348 F.3d 177, 205-06 (6th Cir. 2003), distinguishes *Frazier* on a point that highlights why this Court should grant certiorari here. In that case, Smith's trial counsel *did call* a psychologist to present social and psychological background evidence during the penalty phase, and the habeas court distinguished *Frazier* as

a case where trial counsel had produced no psychological mitigation. *Id.* Distinguishing the case on this ground, however, only serves to highlight the new requirement in the Sixth Circuit that available brain injury evidence must be investigated *and presented.* And, as for the other two cases Frazier cites, neither involved unpresented brain damage evidence, and one of those was not even a capital case.

More interesting are the cases Frazier *fails* to mention. In *Bigelow v. Williams*, 2004 U.S. App. Lexis 9058 (6th Cir. 2004) and *Hamblin v. Anderson*, 354 F.3d 482, 489 (6th Cir. 2003), both cases decided after the decision here, the Sixth Circuit, relying on *Wiggins*, again seemed to reverse the *Strickland* presumption of adequacy. For instance, in *Bigelow*, the court repeatedly noted that the State—not the defendant—had failed to provide an explanation for trial counsel's failure to investigate an alibi:

- "To our knowledge, the *State has not even attempted to offer a strategic explanation* for Rost's failure to investigate further once he learned of Greenlee's evidence." *Id.* at *25 (emphasis added).

- "Thus far, the *State has given no indication* that Rost did any further investigation after hearing from Greenlee and *has offered no reasoned explanation*—strategic or otherwise—why Rost should not have investigated further at that point." *Id.* at *31 (emphasis added).

See also Hamblin, 354 F.3d at 492 (requiring the warden to provide explanations for defense counsel's trial strategy and finding ineffective assistance even though noting that "the district court did not hold an evidentiary hearing or allow any discovery [and therefore] many details of why counsel failed to investigate are not known"). While the court in *Bigelow* at least vacated the judgment and remanded for additional

evidence on counsel's investigation—something that the court should have done in Frazier's case—the court's mode of analysis in both cases demonstrates that the Sixth Circuit now requires *the State* to prove effectiveness of counsel rather than requiring that the habeas petitioner prove ineffectiveness. *Strickland's* presumption of adequacy has been turned squarely on its head.

The Sixth Circuit's decision below continues a pattern within the Circuit of relaxing the defendant's evidentiary burdens in ineffective-assistance-of-counsel cases and thereby changing the landscape of capital jurisprudence in blatant contradiction to this Court's precedent. Contrary to what Frazier claims, since this decision, rendered only eight months ago, the Sixth Circuit has decided at least two other cases, not including *Bigelow supra*, where the court found ineffective assistance of trial counsel in the penalty phase. *See Powell v. Collins*, 332 F.3d 376, 400-01 (6th Cir. 2003); *Hamblin v. Anderson*, 354 F.3d 482 (6th Cir. 2003). As Judge Boggs has noticed, the Sixth Circuit is in the midst of a disturbing trend of increasingly finding ineffective assistance of trial counsel in the penalty phase. *Mason v. Mitchell*, 320 F.3d 604, 642-43 (6th Cir. 2003) (Boggs, J., dissenting) ("This court has reversed capital sentences for failure to present or to investigate mitigatory evidence on no fewer than seven occasions."). By accepting review of this case, the Court could address this trend by providing guidance on the proper scope of both the *Strickland* presumption and the import of *Wiggins* in ineffective-assistance-of-counsel cases.

CONCLUSION

For all of the foregoing reasons, this Court should grant the State's petition and reverse the Sixth Circuit's decision.

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